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ABSTRACT

This document provides suggestions and sample language for university intellectual property rights policies and contracts. The sample language was taken from a review of existing policies, contracts, and American Association of University Professors (AAUP) policy statements. The policy issue is presented in a Roman font, with suggested language presented in italic font. The document addresses: (1) what is "intellectual property"?; (2) who owns the intellectual property?; (3) who may use the intellectual property?; (4) how are any funds to be distributed?; and (5) how are emerging issues and disputes resolved? (EV)

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American Association of University Professors
Special Committee on Distance Education and Intellectual Property Issues

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Suggestions and Guidelines
Sample Language for Institutional Policies and Contract Language

Ownership of Intellectual Property

Intellectual Property has been a long discussed and debated topic, that has become more pressing with recent developments in technology. Many colleges and universities have instituted policies unilaterally, while others have adopted policies negotiated between faculties and administrations. These negotiated policies have sometimes been within collective bargaining contracts and sometimes through some other venue.

Whatever the context, faculties need to develop appropriate policies and language. The following sample language was taken from a review of existing policies, contracts, and AAUP policy statements. (Note on presentation: In the following discussion, the issue is presented in a Roman font, with suggested language presented in an *Italic font.*)

COMPONENTS TO BE INCLUDED WHEN NEGOTIATING CONTRACT LANGUAGE OR A POLICY ON OWNERSHIP OF INTELLECTUAL PROPERTY

- What is "intellectual property"?
- Who owns the intellectual property?
- Who may use the intellectual property?
- How are any funds to be distributed?
- How are emerging issues and disputes resolved?

INTRODUCTION

Preamble

> *The parties to this agreement believe that the public interest is best served by creating an intellectual environment whereby creative efforts and innovations can be encouraged and rewarded, while still retaining for the college or university and its learning communities reasonable access to, and use of, the intellectual property for whose creation the college or university has provided assistance.*
>
> *The college or university supports the development, production, and dissemination of intellectual property by its faculty members.*

What is Intellectual Property?

Although the law provides for a several different types of Intellectual Property, faculty concerns center on two: copyrights and patents. The following definitions are taken from pertinent federal statutes:

> *When used in this agreement, the term **"Copyright"** shall be understood to mean that bundle of rights that protect original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. **"Works of authorship"** (including computer programs) include, but are not limited to the following: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works (photographs, prints, diagrams, models, and technical drawings); motion pictures and other audiovisual works; sound recordings; and architectural works. **"Tangible media"** include, but are not limited to, books, periodicals, manuscripts, phonorecords, films, tapes, and disks.*
>
> *When used in this agreement, the term **"Patent"** shall be understood to mean that bundle of rights that protect inventions or discoveries which constitute any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof; new and ornamental designs for any useful article and plant patents being for the asexual reproduction of a distinct variety of plant, including cultivated sprouts, mutants, hybrids, and new found seedlings, other than a tuber propagated plant or plant found in an uncultivated state.*

[**Note on computer software:** Computer programs fall into a gray area between the two types of intellectual property. Programs that are a part of a "new and useful process" may be eligible for patent protection, while programs embodying minimally original expression may be eligible for copyright protection.]

[**Note on duration of patents and copyrights:** The duration of a patent is 20 years from the date of the filing of the patent. Actual patent protection begins when the patent actually issues from the Patent & Trademark Office. The duration of a copyright (for works created and published after January 1, 1978) is the life of the author plus 70 years. Before that date, the duration of copyright (with some exception) had been 75 years, increased to 95 years in 1998. Unlike patent protection, copyright protection under the Copyright Act attaches as soon as a work is "fixed in a tangible medium of expression," i.e., put on paper. There is no need to place a notice on distributed copies or applying to the Copyright Office for registration. (There are some benefits in doing so, but they are irrelevant to the duration of copyright.)]

Who Owns the Intellectual Property?

AAUP has adopted a policy Statement on Copyright (approved by the Council June 1999) but it has not formally addressed the questions of patents. The copyright statement takes as its guiding assumption that the faculty member (or members) who create the intellectual property, own the intellectual property. ["It has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes." AAUP *Statement on Copyright*.] Although that assumption applies to the patent area as well, there is in the academic context a practice of arranging for agreements between college and university administrations and faculty inventors that provide in some detail a means of sharing income from commercial application of patented inventions.

> *Intellectual property created, made, or originated by a faculty member shall be the sole and*

exclusive property of the faculty, author, or inventor, except as he or she may voluntarily choose to transfer such property, in full, or in part.

The AAUP *Statement on Copyright* describes three limited and expressly defined sets of circumstances where the college or university can claim ownership of the copyright.

- Special works created in circumstances that may properly be regarded as "made for hire." [See the AAUP *Statement on Copyright* for an extended discussion of work for hire. A work should ***NOT*** be treated as "made for hire" merely because it is created with the use of university resources, facilities, or materials of the sort traditionally and commonly made available to faculty members.]
- Negotiated contractual transfers, and
- "Joint works" as described in the Copyright Act, where the institution can be considered a co-author.

The university shall own copyright only in the following 3 circumstances:

- *I. The college or university expressly directs a faculty member to create a specified work, or the work is created as a specific requirement of employment or as an assigned institutional duty that may, for example, be included in a written job description or an employment agreement.*
- *II. The faculty author has voluntarily transferred the copyright, in whole or in part to the institution. Such transfer shall be in the form of a written document signed by the faculty author.*
- *III. The college or university has contributed to a "joint work" under the Copyright Act. The institution can exercise joint ownership under this clause when it has contributed specialized services and facilities to the production of the work that goes beyond what is traditionally provided to faculty members generally in the preparation of their course materials. Such arrangement is to be agreed to in writing, in advance, and in full conformance with other provisions of this agreement.*

WHO MAY USE THE INTELLECTUAL PROPERTY?

A collective bargaining agreement or institutional policy may also allow for institutions to use works created by faculty members without charge for educational and administrative purposes within the institution. Faculty members should be encouraged to include such uses in their agreements transferring copyright for such works to a publisher. These uses would be to enable the institution to operate more efficiently for such purposes as complying with accreditation agency requests, not to infringe on legitimate faculty rights.

Material created for ordinary teaching use in the classroom and in department programs, such as syllabi, assignments, and tests, shall remain the property of the faculty author, but institutions shall be permitted to use such material for internal instructional, educational, and administrative purposes, including satisfying requests of accreditation agencies for faculty-authored syllabi and course descriptions.

In an agreement transferring copyright for such works to a publisher, faculty authors are urged to seek to provide rights for the institution to use such works for internal instructional, educational, and administrative purposes.

DISTRIBUTION OF ANY FUNDS GENERATED

Funds received by the faculty member from the sale of intellectual property owned by the

faculty author or inventor shall be allocated and expended as determined solely by the faculty author or inventor.

Funds received by the college or university from the sale of intellectual property owned by the college or university shall be allocated and expended as determined solely by the college or university.

Funds received by the faculty member and the college or university from the sale of intellectual property owned jointly by the faculty member and the college or University shall be allocated and expended in accordance with the specific agreement herein provided: [must be negotiated by the parties.]

In the event of multiple creators, the creators will determine the allocation their individual shares when the work is first undertaken.

HOW TO RESOLVE EMERGING ISSUES AND DISPUTES

In light of the changing legislative environment, and in view of the evolution of contracts and policies in the intellectual property area AAUP believes that the establishment of an on-going Intellectual Property Committee representing both faculty and administration would serve a useful purpose in both collective bargaining and non-collective bargaining environments. Such a committee could serve a variety of purposes, including keeping faculty and administration apprised of technological changes that will affect the legislative, contract, and policy contexts. Such a committee would play a role in policy development, as well as perform a dispute resolution function. In the absence of such an overall policy committee, a dispute resolution committee with both administrative and faculty representation is essential.

The Intellectual Property Policy and Rights Committee will be composed of members equally apportioned between faculty (elected by the Faculty Senate, or some similar faculty body) and administration (appointed by the president or his/her designee.) The committee members shall elect a chair from among themselves each year. At the time of initial appointment or election, each member shall be designated as serving a one or two, or threeyear term, so that the term of one faculty committee member and one administration member will expire each year and replacements will be appointed or elected each year. After the first appointment subsequent members shall serve a threeyear term, commencing on July 1 and terminating on June 30. Committee members may serve one additional threeyear term.

The Committee shall monitor and review technological and legislative changes affecting intellectual property policy and shall report to relevant faculty and administrative bodies, when such changes affect existing policies.

The committee shall serve as a forum for the receipt and discussion of proposals to change existing institutional policy and/or to provide recommendations for contract negotiations.

Disputes over ownership, and its attendant rights, of intellectual property will be decided by the Intellectual Property Policy and Rights Committee.

The committee shall make an initial determination of whether the college or university or any other party has rights to the invention or other creation, and, if so, the basis and extent of those rights. The committee shall also make a determination on resolving competing faculty claims to ownership when the parties cannot reach an agreement on their own.

The committee will review the merits of inventions, and other creations, and make recommendations for the management of the invention, including development, patenting, and exploitation.

If the inventors/creators disagree with the determination of the committee he/she may appeal to binding arbitration. The cost of the arbitration shall be borne equally by the university and the creator(s).

For further information contact the Mark F. Smith of the
American Association of University Professors
1012 Fourteenth Street N.W. Suite 500, Washington, D.C. 20005-3465
(202) 737-5900 Fax: (202) 737-5526
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